



November 30, 2018

**ILC Draft Articles on Crimes against Humanity– Israel’s initial
comments and observations**

1. The International Law Commission (“ILC”) requested, at its 69th Session (2017), that States submit to the Secretary-General any comments and observations they may have on the Draft Articles on Crimes against Humanity adopted that year on first reading.¹ The present statement is submitted in reply to that request, without prejudice to any further comments Israel may wish to make on this subject in the future.

I. General

2. In line with its longstanding commitment to international criminal justice and to the prevention and punishment of international crimes, Israel welcomes the ILC’s work on the topic ‘Crimes against humanity’.
3. In general terms, Israel is of the view that a comprehensive treatment of the prohibition on crimes against humanity would benefit the international community. It further believes that in order to secure the broadest acceptance of such a project, it is preferable that it would reflect widely accepted principles on the subject and, equally important, contain safeguards against their potential abuse, as suggested below.

II. Adherence to Well Established Principles

4. It is important for the draft articles to accurately reflect well-established principles of international law so as to attract wide acceptance and make the most effective contribution. In certain respects, however, the Draft Articles and the commentary thereto appear to stray from such principles.
5. **The Definition of Crimes against Humanity (Draft Art. 3)** – Israel is mindful of the underlying considerations which have brought the Commission to incorporate the Rome Statute Article 7 definition into Draft Article 3. However, as far as the obligation for criminalization under national law as enshrined in Draft Article 6 is concerned, customary international law does not necessarily or adequately overlap with the definition which appears in Draft Article 3. This is also reflected in the fact that the national laws of domestic jurisdictions which have criminalized crimes against humanity

¹ A/72/10 Draft Articles on Crimes against Humanity, Sixty-ninth session.



differ from one another, as noted in the commentary to the Draft Articles.² We suggest amending the draft articles accordingly.

6. **Responsibility of Commanders and other Superiors (Draft Art. 6(3))** - Draft Article 6(3) deviates from the recognized customary international legal standard for the required *mens rea* for establishing command responsibility, which is the one set forth in the statutes of the *ad hoc* international criminal tribunals set up following the atrocities committed in the former Yugoslavia and in Rwanda (ICTY and ICTR).³

It is therefore suggested that paragraph 3 of Draft Article 6 reflect customary international law, by adopting the standard of "knew or had reason to know" (as appears in Article 7 of the ICTY Statute and Article 6 of the ICTR Statute).

7. **Criminal Responsibility of Legal Persons (Draft Art. 6(8))** – Draft Article 6(8) which provides that each State shall take measures to establish criminal, civil or administrative liability of legal persons for the offences referred to in the current draft article, does not reflect existing customary international law. As acknowledged by the commentary to this draft article, most tribunals to date did not include a provision on criminal liability of legal persons.
8. **Immunity (Draft Art. 6(5))** – Draft Article 6(5) regulates the issue of immunities, and is of a general nature. In our view, it is important to add to the existing clarification in the commentary to this Draft Article that "paragraph 5 has no effect on any procedural immunity that a *current or former* foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary international law."⁴ This would help ensure that this draft article will be interpreted in

² See paragraph (3) to the commentary of Draft Article 6, and pp. 31-32 to the First Report of the Special Rapporteur. See also in paragraph (6) of the commentary to the present Draft Article 6.

³ Draft Article 6(3), in its current form, replicates Article 28 of the Rome Statute. However, there is wide recognition that Rome Statute Article 28 definition does not reflect customary international law. This was stated clearly by the ICC's Office of the Prosecutor in its October 2017 *amicus curiae* submission to the Constitutional Court of Colombia, and in its March 2018 oral presentations in the Bemba Appeals proceedings (see: *Prosecutor v Bemba Gombo*, Appeals Hearing - ICC-01/05-01/08-T-373-ENG, 10 January 2018, pp. 17, 39). The disparity between the customary rule on command responsibility and Article 28 of the Rome Statute has also been discussed by the following authorities: A. Cassese *et al.*, Cassese's International Criminal Law 190 (3rd ed., 2013); Otto Triffterer and Roberta Arnold, *Article 28*, in *The Rome Statute of the International Criminal Court: A Commentary* 1056, 1090-1091 (Otto Triffterer and Kai Ambos (eds.), 3rd ed., 2016); Guénaél Mettraux, *The Law of Command Responsibility* 31, 195 (OUP 2009); Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law* 393-394 (CUP, 2nd ed. 2010).

Moreover, States, including those party to the Rome Statute, which have adopted command and superior responsibility provisions to their domestic laws, have adopted various models, and the Article 28 language can hardly be said to have gained any widespread adoption.

⁴ See commentary to Draft Article 6, para. (31).



accordance with established principles of international law.

9. **Fair treatment of the alleged offender (Draft Art. 11)** –Draft Article 11 veers from existing law by granting alleged offenders rights that are not stipulated in Article 36 of the 1963 Vienna Convention on Consular Relations. In particular, it entitles stateless persons who are in prison, custody or detention in a State, to communicate upon request with a representative of a State who is willing to protect that person's rights. Israel suggests replacing Draft Article 11 with language that accurately reflects customary international law, as stipulated in the abovementioned Article 36 of the Vienna Convention.

III. Safeguarding against Abuse

10. One of the most fundamental principles of international criminal law is that States have the primary sovereign prerogative to exercise jurisdiction in their national courts over crimes against humanity that have been committed either in their territory or by their nationals. This principle is consistent with the notion that the State with territorial or active personality jurisdiction is usually best suited to effectively prosecute crimes and it is in the interest of justice, with due consideration to the interests of victims, the rights of the accused and other similar considerations, that local jurisdictions with clear jurisdictional links would be given primacy. Only when such States are unable or unwilling to exercise jurisdiction, alternative mechanisms should be considered. Israel believes that various safeguards must be included in the draft articles in order to reflect and promote this basic principle.
11. Safeguards should also be adopted in order to prevent the initiation of inappropriate, unwarranted, or ineffective legal proceedings; proceedings where proper standards of due process cannot be met, in particular in cases in which the forum State does not have sufficient access to witnesses and other evidence; and/or proceedings where the incident in question has already been examined by another State with close jurisdictional links.
12. In line with existing practice common in key jurisdictions, such safeguards should therefore include, for example, a requirement that any initiation of legal proceedings would be conducted only with the prior approval of high-level legal officials in the executive branch at the earliest stage; assertion of universal jurisdiction should be regarded as a measure of last resort in appropriate circumstances only; adherence to the principle of subsidiarity; and a requirement that prior to issuing requests for mutual legal



assistance, provisional arrest, or extradition, States take appropriate measures to determine whether the party that filed the complaint has filed complaints about the alleged incident or suspect in other fora, and if so, whether an investigation has taken place or is ongoing there.